

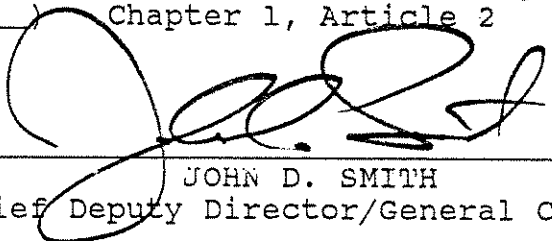
CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

ENDORSED FILED
IN THE OFFICE OF

In re:) 1988 OAL Determination No. 3
Request for Regulatory)
Determination filed) [Docket No. 87-009]
by Michael J. Siegel)
concerning the State Board)
of Control's Review of) March 7, 1988
Psychotherapy Expenses)
for Victims of Crime.¹)
Determination Pursuant to
Government Code Section
11347.5; Title 1,
California Code of Regulations
Chapter 1, Article 2

Determination by:


JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Cindi Rosse, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issues presented to the Office of Administrative Law are:
(1) whether the State Board of Control's policy requiring psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board prior to reimbursement of victims of crime under the Victims of Crime Act² is required to be adopted in compliance with the Administrative Procedure Act (APA); and (2) whether a rule limiting the hourly rate for psychotherapy expenses that can be reimbursed to victims of crime, is required to be adopted in compliance with the APA.

The Office of Administrative Law has concluded that:

(1) the Board's policy requiring psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board, relates only to the internal management of the Board, and therefore is not required to be adopted in compliance with the APA, unless it "affects a matter of serious consequence involving an important public interest;"³ and (2) if the Board, in fact, has a rule limiting the hourly rate for psychotherapy expenses that can be reimbursed to victims of crime, it has failed to comply with the APA in establishing rules and procedures that implement, interpret, or make specific the law administered by the Board.

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ISSUES PRESENTED 4

The Office of Administrative Law ("OAL") has been requested to determine⁵ whether the State Board of Control's policies (1) requiring psychotherapy claims above a certain hourly rate to be reviewed by the Board and (2) limiting the hourly rate for expenses that can be reimbursed to victims of crime under the Victims of Crime Act are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).⁶

The Board contends that it does not have a policy limiting the hourly rate for psychotherapy expenses that can be reimbursed to victims of crime. Instead, the Board asserts that it has an internal management procedure which requires psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board prior to approval or disapproval.

THE DECISION 7, 8, 9, 10

The Office of Administrative Law finds that:

I. The State Board of Control's policy of requiring psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board prior to reimbursement of victims of crime under the Victims of Crime Act relates only to the internal management of the Board, and thus is not subject to the requirements of the APA, unless it "affects a matter of serious consequence involving an important public interest."¹¹

II. If, in fact, the Board has a rule which limits the hourly rate for psychotherapy expenses that can be reimbursed to a victim of crime, the rule (1) is subject to the requirements of the APA,¹² (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

Created in 1945, ¹³ the State Board of Control is the administrative board responsible for adjudicating monetary claims filed against the State of California.¹⁴ In this capacity, the Board reviews and pays claims filed under the Victims of Crime Program. The Victims of Crime Program is designed to "assist residents of the State of California in obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts."¹⁵

Authority ¹⁶

Government Code section 13920 provides in part:

"By a majority vote, the board shall adopt general rules and regulations:

. . . (c) Governing the presentation and audit of claims against the state for which an appropriation has been made or for which a state fund is available. . . . [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁷ Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.¹⁸

In addition, the Board is in substance made subject to the APA by Government Code section 13968, subdivision (a), which states:

"The board is hereby authorized to make all needful rules and regulations consistent with the law for the purposes of carrying into effect the provisions of this article." [Emphasis added.]

We read the phrase "consistent with the law" to mean (among other things) that rules and regulations adopted under this section must be adopted in conformity with the law governing administrative rulemaking, i.e., the APA.¹⁹

General Background

The following facts and circumstances have given rise to the present Determination.

In 1974, the Legislature adopted Government Code section 13959, also known as "California's Victims of Crime Act." Amended in 1982 and 1983, this statute now provides that:

"It is in the public interest to assist residents of the State of California in obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts. This article shall govern the procedure by which crime victims may obtain restitution through compensation from the Restitution Fund." [Emphasis added.]

"Pecuniary loss" is defined as any expense for which the victim has not and will not be reimbursed from any other source²⁰.

Losses include (1) the amount of medical or medical-related expenses, including psychological or psychiatric expenses²¹, and (2) the amount of mental health counseling related expenses which became necessary as a result of the crime.²²

Government Code section 13961, subdivision (a) provides that a victim of a crime may file an application for assistance with the State Board of Control. Government Code section 13965, subdivision (a)(5) provides that the total award to or on behalf of the victim shall not exceed twenty-three thousand dollars (\$23,000.00).

Government Code section 13964, subdivision (a) provides that after hearing evidence relevant to the application for assistance, the Board is required to approve the application if a preponderance of the evidence shows that as a direct result of the crime the victim incurred an injury which resulted in a pecuniary loss.

A Request for Determination was filed with OAL on May 18, 1987, by Michael J. Siegel, Attorney at Law, who represents victims and their families in applying for victim restitution. The Requester asserts that "The Board has adopted a policy of limiting reimbursement for psychotherapy expenses incurred as a result of a crime. Under this policy, therapy by an L.C.S.W. [licensed clinical social worker] or an M.F.C.C. [marriage, family and child counselor] is limited to \$80.00 dollars per hour, and therapy by a Ph.D. [psychologist] or an M.D. [psychiatrist] is limited to \$100.00 dollars per hour."

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The Requester asserts that this policy "is confirmed (in part) in a memorandum dated August 2, 1985 (with handwritten revisions), from Executive Officer Lane Richmond to Managers, Analysts, Supervisors, Seniors [sic], Claims Specialists, and Victim Centers."

The pertinent memorandum language reads as follows:

"Psychotherapy expenses verified at \$80 per hour or more when provided by an L.C.S.W. or M.F.C.C. will be discussed by the Board. Therefore, verification will be placed on the General Comments Page. . . . "

It is not wholly clear from the record before us, what procedures are involved in the "verification" of psychotherapy expenses. For purposes of this Determination, we assume that "verification" means that bills have been submitted substantiating psychotherapy expenses claimed at certain hourly rates.

On January 25, 1988, the Board filed a Response to the Request with OAL. In its Response the Board states that:

"The Board disputes the contention that the Board's procedure of reviewing the billing costs for mental health therapy constitutes an 'underground regulation' "

"The Board of Control is charged, pursuant to Government Code section 13959, et seq., with the responsibility of reviewing and making payment of claims filed under the Victims of Crime Program. This responsibility includes the verification of both the qualification of the claim and amount of reimbursement for pecuniary losses suffered. [see Gov. Code section 13962 (b)]. In order to accomplish this purpose, the staff must be given instructions and procedures for the review of claims. The Board understands that, to the extent those instructions and procedures result in a determination of the qualification of a claim, then those instructions and procedures shall properly be considered regulations. However, when those instructions merely indicate how a claim is to be handled, those instructions deal only with the internal management of the claim handling process and do not rise to the status of regulation as previously defined." [Emphasis added.] 23

The Board contends that the rule that claims for psychotherapy expenses of \$80.00 per hour or more provided by a licensed clinical social worker or marriage, family and child counselor, or \$100.00 or more provided by an M.D. or Ph.D. shall be reviewed by the Board, is not a "regulation." The Board asserts that the rule falls within the category of internal claims management procedures which "merely require

the claims to be reviewed by the Board prior to being approved or disapproved as necessary mental health counseling expenses pursuant to Government Code section 13960(b)(2) [sic]."24 [Emphasis added].

II. DISPOSITIVE ISSUES

There are two main issues before us:25

- (1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

" (a) No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, does the informal rule either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

With respect to the Board's rule that psychotherapy expenses claimed at certain hourly rates be reviewed by the Board prior to reimbursement, the answer to the two part inquiry described above is "yes". As will be discussed later in this Determination, however, if the rule, in fact, merely concerns the internal routing of claims from the Board's staff to the Board, without more, this would fall within the "internal management" exception to the APA.

If, on the other hand, the Board is imposing additional procedural requirements, such as requiring appearance at a hearing for claims exceeding a certain hourly rate, or if the Board is routinely denying all claims exceeding a certain hourly rate, this is a matter of serious consequence involving an important public interest.²⁶ As will be discussed below, such matters having serious impact on the public do not fall within the "internal management" exception.

ANALYSIS

1. Rules or Standards of General Application

Turning to the first part of the two-part inquiry, we note that the Board's rule that certain psychotherapy expenses be reviewed by the Board prior to reimbursement, is a rule or standard of general application. For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order.²⁷

The Board's rule applies to all victims of crime who have claimed psychotherapy expenses of \$80.00 per hour or more provided by a licensed clinical social worker or marriage, family and child counselor, or \$100.00 or more provided by an M.D. or Ph.D. It is a rule or standard of general application within the meaning of the APA.

2. Rules Which Implement, Interpret, or Make Specific the Law or Which Govern Agency Procedure

The second part of the two part "regulation inquiry" is whether the rule implements, interprets, or makes specific the law enforced or administered by the agency.

Although a number of appellate cases discuss the Board's duties and victims' rights to benefits under the Victims of Crime Act, no appellate case discusses the rule at issue herein.²⁸

The statutes which the rule is implementing, interpreting, or making specific are as follows:

Government Code section 13961, subdivision (a) provides that a victim of a crime may file an application for assistance with the Board.

Government Code section 13962, subdivision (a) provides in part that the staff of the Board shall appoint a clerk to review all applications for assistance in order to ensure that they are complete.

Government Code section 13962, subdivision (b) provides in part that the Board shall consider the application at a hearing.

Government Code section 13963, subdivision (a)(1) provides that at the hearing the Board shall instruct its staff, prior to the start of the proceedings, to brief the claimants present on the rules, regulations and any other procedures and guidelines used by the Board at such hearings.

Government Code section 13964, subdivision (a) provides that after hearing the evidence relevant to the application for assistance, the Board shall approve the application if a preponderance of the evidence shows that as a direct result of a crime the victim incurred an injury which resulted in a pecuniary loss.

Government Code section 13965, subdivision (a)(5) provides that the total award to or on behalf of the victim shall not exceed \$23,000.00.

As discussed under General Background, supra, Government Code section 13960, subdivisions (d)(1) and (2), defines "pecuniary loss" to mean any expense for which the victim has not and will not be reimbursed from any other source. Losses include (1) the amount of medical or medical-related expense, including psychological or psychiatric expenses; and (2) the amount of mental health counseling related expenses which become necessary as a direct result of a crime.

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Finally, as also discussed above, Government Code section 13968, subdivision (a) provides that:

"The board is hereby authorized to make all needful rules and regulations consistent with the law for the purposes of carrying into effect the provisions of this article."

Pursuant to the authority granted by Government Code section 13968, the Board has in fact adopted regulations set out in the California Code of Regulations (CCR), Title 2, sections 649.1 - 649.8, entitled "Indemnification of Victims of Crime".

Specifically, Title 2, CCR, section 649.4 provides:

"It shall be the responsibility of the applicant to prove to the satisfaction of the Board, by a preponderance of evidence, that the injuries or death giving rise to the application arose from a crime which was promptly reported to a proper law enforcement agency; the extent of the out-of-pocket losses sustained as a direct result of such crime; that the victim did not, by his/her acts, contribute to the injuries suffered; and the victim's need for job retraining or similar employment-oriented services."

Although the Board has adopted regulations pursuant to the APA for the indemnification of victims of crime pursuant to the authority vested in it by Government Code section 13968, a review of all of the regulations adopted reveals no mention in regulation, nor in statute, of the rule which requires psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board prior to being either approved or disapproved as necessary mental health counseling expenses.

We must therefore conclude that this rule is a standard of general application implementing, interpreting, or making specific the law administered by the Board.

Of course, the same analysis used above would apply a fortiori if the rule limited the hourly rate for psychotherapy expenses that could be reimbursed to victims of crime.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.²⁹

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The Board contends that the rule at issue herein falls within the "internal management" exception. The Board correctly points out that Government Code section 11342, subdivision (b) expressly states that rules relating only to the internal management of a state agency are exempt from the requirements of the APA.

If the rule does, in fact, merely instruct the Board's staff to route the claims to the Board for "discussion," without requiring more, such a rule relates only to the internal management of the Board.

If, however, the Board uses the rule to impose additional procedural requirements, such as requiring appearance at a hearing, or if the Board routinely denies all claims for psychotherapy expenses exceeding a certain hourly rate, such a rule affects victims of crime statewide. It is a standard of general application which implements, interprets, or makes specific the law administered by the Board and involves matters of serious consequence involving an important public interest.³⁰ The Legislature has clearly stated that there is a public interest in assisting Californians in "obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts."³¹ Without doubt, an uncodified policy which limited the degree to which victims could obtain restitution would be a matter "of serious consequence." The argument that such rules, though affecting the public, fall within the "internal management" exception has been consistently rejected by appellate courts, and has been discussed in several determinations.³²

Although not specifically raised by the Board in its Response, we have considered the issue of whether proceedings which are "quasi-judicial" in nature are exempt from APA rulemaking requirements. (This issue has arisen in other Determinations.³³) We assume arguendo that the rules at issue in this Determination are rules pertaining to quasi-judicial proceedings. Our research indicates, however, that there is no exemption from APA rulemaking requirements based on the fact that the Board may be acting in a quasi-judicial capacity. Rules governing quasi-judicial proceedings should be placed in regulation.³⁴

WE CONCLUDE THAT NONE OF THE RECOGNIZED EXCEPTIONS TO APA RULEMAKING REQUIREMENTS APPLY TO THE "HOURLY RATE LIMIT" COMPONENT OF THE CHALLENGED RULE.

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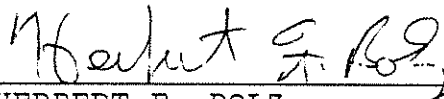
III. CONCLUSION


For the reasons set forth above, OAL finds that:

I. A rule which merely requires the Board's staff to route psychotherapy expenses claimed at certain hourly rates to the Board for review prior to reimbursement, relates only to the internal management of the Board, and thus is not subject to the requirements of the APA.

II. If the Board imposes additional procedural requirements on claimants or routinely denies claims for psychotherapy expenses exceeding certain hourly rates, that this rule (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) therefore violates Government Code section 11347.5, subdivision (a).

DATE: March 7, 1988


HERBERT F. BOLZ
Coordinating Attorney


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- 1 This Request for Determination was filed by Michael J. Siegel, Attorney at Law, P.O. Box 162447, Sacramento, CA 95816, (916) 395-3648. The agency Response for the State Board of Control was signed by Austin Eaton, Executive Officer, Victims of Crime Program, P.O. Box 3036, Sacramento, CA 95812-3036, (916) 322-4426.
- 2 See Government Code sections 13959 through 13969.2.
- 3 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 944, 107 Cal.Rptr. 596, 603.
- 4 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Regulatory Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute.
- 5 Title 1, California Code of Regulations (CCR), (formerly

known as California Administrative Code), section 121(a) provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act." [Emphasis added.]

6 Government Code section 11347.5 (as amended by Stats. 1987, c. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.
3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting

that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added.]

7 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Regulatory Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

8 No public comments were received concerning this Request for Determination. The Board submitted a Response to the Request for Determination, and it was considered in making this Determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for

the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

- 9 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (emphasis added; Government Code section 11347.5, subdivision (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute).
- 10 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on page 1.
- 11 See note 3, supra.
- 12 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 13 Government Code section 13900, Chapter 112, Statutes of 1945.
- 14 See Government Code sections 13901 and 13920.
- 15 See Government Code section 13959.
- 16 We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

- 17 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).
- 18 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 19 See 1986 OAL Determination No. 4 (Board of Equalization, June 25, 1986, Docket No. 85-005), California Administrative Notice Register 86, No. 28-Z, July 11, 1986, pp. B-13--B-14, typewritten version, pp. 9-10; 1986 OAL Determination No. 10 (Department of Developmental Services, November 26, 1986, Docket No. 86-006), California Administrative Notice Register 86, No. 50-Z, December 12, 1986, pp. B-11, typewritten version, p. 3.
- 20 Government Code section 13960, subdivision (d).
- 21 Government Code section 13960, subdivision (d)(1).

- 22 Government Code section 13960, subdivision (d)(2).
- 23 See Board's Response, page 1.
- 24 See Board's Response, page 2.
- 25 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
- 26 See note 3, supra.
- 27 Roth v. Department of Veteran Affairs (1980), 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
- 28 See Anne B. v. State Board of Control (1984) 165 Cal.App.3d 279, 209 Cal.Rptr. 83; Burnsed v. State Board of Control (1987) 189 Cal.App.3d 213, 234 Cal.Rptr. 316; Blazevich v. State Board of Control (1987) 191 Cal.App.3d 1121, 237 Cal.Rptr. 35; Webster v. State Board of Control (1987) 242 Cal.Rptr. 685.
- 29 The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but generally do not apply to the case at hand:
- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343,

subd. (a)(3).)

- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning APA exceptions is contained in a number of previously issued OAL determinations. The Index of OAL Regulatory Determinations (available from OAL, (916) 323-6225, ATSS 473-6225) is a helpful guide for locating such information.

30 See note 3, supra.

31 Government Code section 13959.

32 Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, 149 Cal.Rptr. 1, 3-4; Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135; Faunce v. Denton (1985), 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125; Poschman v. Dumke (1973), 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596, 602-603; San Diego Nursery Company, Inc. v. Agricultural Labor Relations Board (1979) 100 Cal.App.3d 128, 142, 160 Cal.Rptr. 882, 830; Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24.

The following determinations have discussed the 'internal management' exception":

1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13, typewritten version, p. 6.

1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-99, n. 39, typewritten version, n. 39.

1987 OAL Determination No. 9 (Department of Corporations, June 30, 1987, Docket No. 86-015), California Administrative Notice Register 87, No. 29-Z, July 17, 1987, p. B-39--B-41, typewritten version pp. 12-15.

1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016), summary in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 33; typewritten version, pp. 25-28.

1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-9.

- 33 1987 OAL Determination No. 5 (State Personnel Board, April 30, 1987, Docket No. 86-011), California Administrative Notice Register 87, No. 20-Z, May 15, 1987, p. B-58, n. 13; typewritten version, n. 13; 1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016), summary in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 33; typewritten version, n. 28.

- 34 See, e.g., State Personnel Board rules governing quasi-judicial proceedings contained in Title 2, CCR, sections 68 and 547.30-547.33; see also City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3rd, 572, 580, 142 Cal.Rptr. 356, 361.

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